



Billing Code: 7565-01

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 502

Electronic One Touch Bingo System

AGENCY: National Indian Gaming Commission

ACTION: Request for Public Comment.

SUMMARY: The National Indian Gaming Commission (NIGC) is seeking comment on a proposed reinterpretation of an agency decision regarding the classification of server based electronic bingo system games that can be played utilizing only one touch of a button (“one touch bingo”). The proposed reinterpretation is in response to questions the NIGC received from the regulated community and the public about whether one touch bingo is a Class II or Class III game.

DATES: The agency must receive comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]..

ADDRESSES: You may submit comments to the Commission by any one of the following methods, but please note that comments sent by electronic mail are strongly encouraged.

- Email comments to: reg.review@nigc.gov
- Mail comments to: National Indian Gaming Commission, 1441 L Street NW, Suite 9100, Washington, D.C. 20005.
- Hand deliver comments to: 1441 L Street NW, Suite 9100, Washington, D.C. 20005.

- Fax comments to: National Indian Gaming Commission at 202-632-0045.

FOR FURTHER INFORMATION CONTACT: Michael Hoenig, National Indian Gaming Commission, 1441 L Street NW, Suite 9100 Washington, DC 20005. Telephone: 202-632-7009; email: reg.review@nigc.gov

SUPPLEMENTARY INFORMATION:

I. General Information

This notice is directed to the public in general and may be of interest to a wide range of parties, including, but not limited to, tribal gaming operations, tribal gaming regulators, and tribal, state, and local governments. The NIGC is inviting interested parties to participate in this proposed reinterpretation by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned decisions on the proposal.

II. Background

The NIGC has received several questions from the regulated community regarding the status of one touch bingo as a Class II or a Class III game pursuant to the Indian Gaming Regulatory Act (IGRA). In an electronic one touch bingo game, the player inserts money into the gaming machine, which is connected to other bingo machines in an electronically linked bingo system, and presses a button once to play a game of bingo. This, according prior NIGC Office of General Counsel legal opinions and a Chairman's decision on a game-specific tribal gaming ordinance, does not constitute Class II bingo because it does not require players to participate in the bingo game by taking further action to cover the numbers on the cards.

In 2008, the Metlakatla Indian Community submitted an amendment to its tribal gaming ordinance which defined Class II gaming as including one touch bingo. Specifically, the Community set forth the following definition: “Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.” Chairman Hogen disapproved the ordinance amendment based on this definition. The Chairman’s decision (Metlakatla Decision or Decision) provided a detailed explanation of the game of bingo and the elements that must be present for it to be a Class II game. According to the Decision, the game of bingo under IGRA has certain specific, essential elements, including the requirement that a player cover the drawn numbers on a bingo card and that the game be won by the first person to do so. 25 U.S.C § 2703(7)(A)(i)(II) and (III). The Chairman reasoned that inherent in the “first person covering” language is an element of competition – namely, multiple players competing with one another to be the first to cover a particular pattern. According to the Metlakatla Decision, that competition does not exist in a one touch bingo game. Without the element of competition through player participation, then, the Decision concluded that one touch bingo does not meet the requirements of IGRA’s *Class II gaming* definition.

The Metlakatla Decision also concluded that one touch bingo is not a Class II “game similar to bingo.” The Decision reasoned that, because one touch bingo does not include the requisite element of competition, it cannot meet the NIGC’s regulatory definition of *other games similar to bingo*, which requires the game to “permit players to compete against each other.” Finally, the Decision determined that allowing the game system, rather than the player, to

“cover” the bingo card incorporates all characteristics of the game of bingo into an electronic machine and system, and thereby renders one touch bingo a Class III electronic facsimile of a game of chance.

The Commission, however, finds that the more reasonable interpretation of IGRA’s definition of Class II gaming leads the conclusion that one touch bingo is a Class II bingo game. The NIGC proposes to reinterpret the position regarding one touch bingo as set forth in the Metlakatla Ordinance disapproval and is seeking comment on this proposal. The NIGC believes that this proposed reinterpretation is more in keeping with IGRA’s definition of bingo and will bring clarity to the industry.

III. Summary of Proposed Reinterpretation

Pursuant to IGRA, Class II bingo has three elements. First, it must be played for prizes, including monetary prizes, with cards bearing numbers or other designations. Next, the holder of the card must cover such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. Finally, the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards. 25 U.S.C. § 2703(7)(A)(i)(I)-(III).

One touch bingo meets IGRA’s statutory requirements for a game of bingo. The type of one touch game at issue here is played for prizes, usually money, on a card bearing numbers or symbols. It also satisfies IGRA’s second element that “the holder of the card covers [the] numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined.” In one touch bingo, the player covers the numbers or designations when drawn. That step is achieved by the assistance of a machine via the first, and only, touch of the button. Finally, the game meets the third element. The machine assists the player in being

the first person to cover the designated arrangement, and the game is won by the first person to cover the pre-designated winning pattern in the electronically linked bingo system.

The Ninth Circuit Court of Appeals has held that the 3 elements of IGRA and NIGC regulations for bingo are all that the law requires for Class II bingo. *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000) (“IGRA’s three explicit criteria, we hold, constitute the sole legal requirements for a game to count as class II bingo”); *see also United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000) (finding that Section 2703(7) sets forth 3 explicit criteria for classification of Class II). Further, the court in *103 Electronic Gambling Devices* held that “there is nothing in IGRA or its implementing regulations . . . that requires a player to independently locate each called number on each of the player’s cards and manually ‘cover’ each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered.” *United States v. 103 Elec. Gambling Devices*, *supra* at 18.

Thus, the previous interpretation’s requirement that the cover of the bingo card be done manually by the player through an additional pressing of a button is an additional requirement not mandated by the statute. Player participation in an electronically linked one touch bingo game still exists and players are actively and actually participating in the game. Whether a player presses a button one time or two, the player is engaging with the machine, participating in the bingo game, and competing with fellow players on the electronically linked bingo system.

Likewise, in one touch bingo, the possibility that more than one player can simultaneously get “bingo” does not conflict with IGRA’s requirement that the game be won by “the first person to cover.” In *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. Okla. 2000), the United States sought to seize bingo machines operated by

various Oklahoma tribes for Johnson Act violations. The government argued, in part, that MegaMania was a Class III game “because a player does not have to be the first player to cover the designated pattern of numbers to win.” *Id.* at 721.

In response, the 10th Circuit Court of Appeals underscored the lower court determination that “nothing in the Gaming Act or regulations prohibits more than one winner” and held that “the language in [IGRA] concerning the ‘first person’ to win is not limited to a straight-line game and should not be read in isolation from the traditional variations of bingo that allow interim prizes and simultaneous winners.” *Id.* at 722. Accordingly, a machine that allows two simultaneous bingos in a game may still be a Class II bingo machine. *Id.*; *See also 103 Electronic Gaming Devices*, 223 F.3d at 1098-99 (the 9th Circuit reached the same conclusion, holding “winning” does not necessarily mean “vanquishing” all other opponents, and identifying Congress’ intent to permit interim prizes, given that some traditional variants of bingo allow them.).

Nor does the fact that a game of bingo can be played with one touch of a button by itself transform the machines into a Class III electronic facsimile of the game of bingo. One touch bingo does not incorporate all of the characteristics of bingo. The machine, for example, does not replicate the competitive element of bingo. Players still compete with other players, not the machine.

Also, there is an exception for bingo in the regulatory definition of electronic facsimile, which exempts electronic bingo that broadens player participation by allowing multiple players to play with or against each other rather than with or against a machine. As this proposed reinterpretation finds that one touch bingo meets the statutory definition of the game of bingo and does not incorporate all the characteristics of bingo into the machine, the application of the

exception is not necessary. However, the previous interpretation concluded “as it is applied to bingo, ... the “except when” language of 502.8 [] require[s] some - even minimal participation in the game by the players above and beyond the mere pressing of a button to begin the game.” We find this interpretation in error because whether a game constitutes bingo or not cannot be reduced to the number of times a button is pushed. Rather, as set out above, we must look to whether the statutory elements of the game are met. And, as also set out above, we find that for one touch bingo they are. One touch bingo does incorporate player participation in the game beyond the pressing of a button.

Finally, the Commission should give consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming. The Senate Select Committee on Indian Affairs affirmed in its report regarding the Indian Gaming Regulatory Act that it “intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.” S. Rep. No. 100-446 at p. A-9. In explaining its policy toward technology, a key distinction for the Committee was that technological aids are “readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.” *Id.* One touch bingo does not change that fundamental aspect of bingo. Whether played on a one or two touch machine in a linked system, the player is still competing with other bingo players for a prize.

For all of the above reasons, the NIGC proposes to reinterpret its position on one touch bingo, as previously set forth in the June 4, 2008 decision disapproving the Metlakatla Indian Community’s Tribal Gaming Ordinance.

Dated: June _19, 2013, Washington, D.C.

Tracie L. Stevens
Chairwoman

Daniel J. Little
Commissioner

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